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No. 80-1913

IN THE

Supreme Court of the United States

October Term, 1980

MONONGAHELA POWER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents,

and

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Intervening Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF INTERVENING RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the action of the Interstate Commerce Commission in denying reparation of the penalty portion of demurrage charges, when the shipper has obtained alternate relief through the average agreement, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

DISCLOSURE STATEMENT REQUIRED BY RULE 28.1

The Baltimore and Ohio Railroad Company is a subsidiary of The Chesapeake and Ohio Railway Company, which owns 99.9% of its capital stock. The Chesapeake and Ohio Railway Company is a wholly-owned subsidiary of CSX Corporation. Other corporations (other than wholly-owned corporations) which are subsidiaries or affiliates of B&O are shown below:

The Akron and Barberton Belt RR Co.
The Akron Union Passenger Depot Co.
Allegheny and Western Ry. Co.
Atlanta and West Point RR Co.
Augusta & Summerville RR Co.
The Baltimore and Cumberland Valley RR Extension Co.
The Baltimore and Philadelphia RR Co.
Beaver Street Tower Co.
Belt Railway Co. of Chicago
Buffalo, Rochester and Pittsburgh Rwy. Co.
Central Florida Pipeline Corp.
Central RR Co. of South Carolina
Central Transfer Rwy. & Stge. Co.
Chatham Terminal Co.
Chicago South Shore and South Bend RR
Chicago & Western Indiana RR Co.
Cincinnati Inter-Terminal RR Co.
Cincinnati Union Terminal Co.
Clearfield and Mahoning Rwy. Co.
The Cleveland Terminal & Valley RR Co.
Clinchfield RR Co.
Columbia, Newberry & Laurens RR Co.
Dayton and Michigan RR Co.
The Dayton and Union RR Co.
Durham and Southern Ry. Co.
Duval Connecting RR Co.
Eastern Hardwoods, Incorporated
First Georgia Development Co.
Fruit Growers Express Co.
Georgia RR
Green Real Estate Co.

Haysi RR Co.
High Point, Thomasville & Denton RR Co.
Holston Land Co., Inc.
The Home Avenue RR Co.
Illinois Terminal RR Co.
James Center Development Co.
Kentucky & Indiana Terminal RR Co.
The Lakefront Dock and RR Terminal Co.
Littleton Fuel Company
Louisville, Henderson & St. Louis Ry. Co.
Mid Allegheny Corporation
Monon Coal Co., Inc.
The Monongahela Rwy. Co.
Nashville & Decatur RR Co.
New Gauley Coal Corporation
Nicholas, Fayette and Greenbriar RR Co.
Norfolk and Portsmouth Belt Line RR Co.
North Charleston Terminal Co.
Paducah & Illinois RR Co.
Park-N-Shop, Inc.
The Pullman Co.
Richmond, Fredericksburg and Potomac RR Co.
Richmond Land Co.
Richmond-Washington Co.
Savannah River Terminal Co.
South Carolina Pacific Ry. Co.
Terminal RR Assoc. of St. Louis
The Toledo Terminal RR Co.
Trailer Train Co.
The Tylerdale Connecting RR Co.
Washington County RR Co.
The Washington Terminal Co.
Wesjax Development Co.
Western Maryland Company
Western Maryland Ry. Co.
Western Ry. of Alabama
The Winchester and Potomac RR Co.
Winston Land Corp.
Winston-Salem Southbound Rwy. Co.
Woodstock & Blocton Ry. Co.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The right of a railroad to impose a demurrage charge in the nature of a penalty to secure the prompt release of cars held by shippers and consignees for loading or unloading has long been recognized. *Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co.*, 271 U.S. 259 (1926); *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co.*, 253 U.S. 319 (1920); *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281 (1917). This right was standardized in 1909 in a Uni-

form Demurrage Code adopted by the Railroads and endorsed by the Interstate Commerce Commission. *Swift & Co. v. Hocking Valley R. Co., supra; In Re Demurrage Investigation,* 19 I.C.C. 496 (1910).

This Uniform Demurrage Code contained two alternative methods of computing demurrage charges, generally known as the "straight plan" and the "average agreement." These two plans remain in effect today, essentially unchanged from those contained in the original Uniform Code. Under the "straight plan," charges are computed separately on each rail car. If a shipper elects to have its charges computed pursuant to the "average agreement," cars released within the first 24 hours of free time earn a "credit," which may be used to offset "debits" incurred on cars held beyond the expiration of free time. At the end of each calendar month, the debits and credits are calculated, and charges for excess debits, if any, are assessed. No more than four chargable days on any one car may be offset by credits earned on other cars, and any excess credits remaining at the end of the month are cancelled. *Car Demurrage Rules, Nationwide,* 350 I.C.C. 777 (1975); *Increased Demurrage Charges, 1956,* 300 I.C.C. 577 (1957).

Although the average agreement is mutual in its effect, involving a give-and-take of advantages between carrier and shipper, it is generally viewed as a concession in favor of the shipper or consignee, whereby the shipper or consignee may reduce its obligation for demurrage charges. *Demurrage Rules & Charges, Nationwide,* 340 I.C.C. 83, 85 (1971); *Berwind White Coal Mining Co. v. Chesapeake & O. Ry.,* 289 I.C.C. 535, 540 (1953). As a part of the give-and-take, the shipper or consignee electing the average agreement basis of calculating charges gives up certain rights for relief from charges available to shippers utilizing the straight plan. *Car Demurrage Rules, Nationwide,*

supra. Each shipper determines for itself whether the straight plan or the average agreement is most advantageous to it, and shippers and consignees can and do change from one plan to another. *Increased Demurrage Charges, 1956, supra*, at 579.

In this case, Monongahela, which has enjoyed the benefits of the average agreement for 30 years,[1] now seeks additional relief from demurrage charges which accrued during the winter of 1977-78 as a result of delays in unloading rail equipment incurred because the equipment arrived with frozen coal. The Interstate Commerce Commission denied relief on the grounds that the average agreement is a contract between the carrier and the shipper under which the shipper can obtain relief from demurrage charges, that the average agreement is recognized as a concession in favor of the shipper which provides that demurrage charges caused by weather interference, frozen lading, or car bunching are offset by the debit and credit balancing of the agreement, and that therefore such occurrences may not be subsequently raised to excuse the accrual of excessive detention time.

The Fourth Circuit Court of Appeals affirmed the ICC, stating that its position, that "its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied when the parties, by terms of the average agreement, had otherwise provided for a credit system for minimizing demurrage," is "unassailable."[2]

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[1] See footnote 4 of the decision below, 640 F.2d 504, 506. See also Appendix A, p. A-4, to the Petition for Writ of Certiorari herein (hereinafter "the Petition").

[2] 640 F.2d at 506, 507; Appendix A to the Petition, p. A-4, A-5.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission denied Monongahela's complaint seeking reparation of demurrage charges caused when cars were received containing frozen lading, on the grounds that the average agreement, in effect between Monongahela and B&O for over 30 years, provides an alternate basis for relief from demurrage charges caused by frozen lading.

The decision of the Circuit Court upholding this decision is based on the rationale expressed by the ICC and does not give undue deference to the decision of the agency. No important federal question is presented because the reasonableness of the average agreement has long been established, the interpretation given to it by the ICC has been consistently applied and is in accordance with established precedent, and the average agreement basis of computing charges provides an alternate method for relief from applicable charges which applies at the election of the shipper or consignee.

ARGUMENT

I. No Basis For Review Has Been Shown

Monongahela has assigned two well-known bases of review as error in the decision of the Court below. However, neither basis actually exists in this case.

A. The Court of Appeals Followed the Rationale Set Forth By the Agency.

First, Monongahela argues that the decision below rests on the *post-hoc* rationalizations of counsel rather than the stated rationale of the ICC.

The rationale of the ICC decision is set forth in the decision of Review Board No. 4 decided February 25,

1980.[3] There the ICC reviewed the tariff provisions which authorize relief to straight plan and average agreement shippers. It noted the contractual nature of the average agreement, the Commission's policy of encouraging contract rates, and the fact that a purpose of the average agreement is the offsetting of some demurrage caused by weather interference, frozen lading or car bunching. It cited other decisions of the ICC showing the establishment of a policy of denying further relief from charges accrued from such causes when the average agreement basis has been used for the settlement of demurrage charges. It thus concluded that the average agreement barred further relief and that in doing so it was not inequitable.

The decision of the Court of Appeals was based squarely on this rationale. The Court noted the existence of the average agreement between the parties and that its principal purpose was the spreading of demurrage liabilities over all shipments. It acknowledged the policy of the ICC that liability for demurrage charges would not be excused, even where freedom from fault could be shown, where the parties through the average agreement had otherwise provided for a credit system of minimizing demurrage charges. It noted that this policy of refusing to allow a shipper or consignee the advantages of straight demurrage and the average agreement while excusing it from the disadvantages of either had been consistently

[3] See Appendix B to the Petition. The decision of the Review Board, acting in an appellate capacity, is final agency action, subject to discretionary review by the ICC. Monongahela filed a petition for administrative review, which was denied by order of the full Commission, dated June 30, 1980.

applied by the ICC.[4] And finally, it noted that this case did not present a case of tariff interpretation.

Monongahela argues that there is a difference between the finding of the ICC that frozen lading is provided for in the average agreement contract and cannot be subsequently raised, and the court's finding that shippers should not be relieved from demurrage liability as a result of frozen lading when the parties have otherwise provided in the average agreement for the minimizing of demurrage charges. But of course this is the same finding, stated differently. In short, there is no substantive difference in the findings or rationale of the agency and the court.

Monongahela cites *du Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *rev'd in part on other grounds*, 430 U.S. 112 (1977) for the proposition that agency action must be sustained on the basis relied on by the agency itself, and not on the *post-hoc* rationalizations of counsel.

This is the same proposition which was stated in *S.E.C. v. Cherney Corp.*, 332 U.S. 194 (1947), which noted

> that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. . . .
>
> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court

[4] The Court cited a number of ICC cases demonstrating the consistent exercise of this policy, some of which had been decided subsequent to the agency decision in this case. But this does not indicate a deviation from the rationale of the ICC or a *post-hoc* rationalization.

> be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511.
>
> 332 U.S. 194, at 196-197.

However, while a decision must be understandable, it need not be a model of clarity. A decision will be found adequate if "the path which it followed can be discerned," and if its findings are not "so vague and obscure as to make . . . judicial review . . . a perfunctory process." *Colorado Interstate Gas Co. v. F. P. C.*, 324 U.S. 581, 595 (1945). See also *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281 (1974).

The decision of the agency below in the instant case clearly met these criteria, and the decision of the Circuit Court correctly followed the rationale of the agency.

B. Proper Deference Was Given to the Agency Decision.

The second error alleged by Monongahela is that the Court of Appeals gave undue deference to agency expertise and affirmed a decision not having a rational basis. This argument seems to be based on allegations that, considering only the demurrage charges at issue here, the average agreement cannot provide for complete elimination of demurrage charges, and that therefore the bargained-for relief is inadequate and fails of its purpose. But it has never been maintained that the average agreement will provide relief which is an exact mirror of the relief available under the straight plan. On the contrary, the average agreement provides substantial relief in the ordinary course of business where no relief is available to a straight plan shipper in the same circumstances. Monongahela has had available the benefits of the average

agreement for over 30 years. It is of no significance that, during the three-month period in question, it might have been entitled to greater relief had it been operating under the straight plan. As stated by the Circuit Court, the Commission simply "determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantages of either."[5]

Monongahela, having enjoyed the advantages of the average agreement for over 30 years, now wishes to obtain the advantages of the straight plan, where, in the particular circumstances involved, they are perceived to be more advantageous. The Commission's decision to forbid the dual enjoyment of the advantages of these alternative plans is clearly rational.

The scope of review of agency action in a matter requiring discretionary relief is narrow, and the decision of the agency is entitled to considerable deference. *Consolo v. F.M.C.*, 383 U.S. 607, 620-621 (1966); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Bowman Trans. v. Arkansas-Best Freight, supra; S.E.C. v. Cherney Corp., supra.* Here the agency decision had a clearly rational basis and the Circuit Court did not err in affirming it.

II. No Important Question of Federal Law Is Presented

As noted above in the Statement of the Case, the average agreement basis of computing demurrage charges has been available as an alternate means of computing demurrage charges since the adoption of the Uniform Demurrage Code in 1909. The average agreement basis has consistently been found reasonable. See *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co., supra; Swift & Co.*

[5] 640 F.2d at 507; Appendix A to the Petition, p. A-5.

v. Hocking Valley R. Co., supra; Increased Demurrage Charges, 1956, supra; Oliver Mfg. Supply Co. v. Reading Co., 297 I.C.C. 654 (1956); *Southern California Minerals Co. v. Union Pac. R. Co.*, 263 I.C.C. 659 (1945); *Davis Sewing Machine Co. v. Pittsburgh, C., C., & St. L. RR. Co.*, 51 I.C.C. 191 (1918); *In Re Demurrage Investigation, supra.*

Also, as found by the Circuit Court below, the ICC has consistently applied its policy of denying additional relief when charges have been computed in accordance with the average agreement.

Monongahela argues that this policy may penalize average agreement shippers under some circumstances for detention which is beyond their control. However, the average agreement provides relief in other circumstances which offsets such penalties. The Commission's policy is only that, when the shipper elects one or the other plan for the calculation of charges, it is bound to take that plan in its entirety, and cannot pick and choose the advantages of both plans whenever in any circumstance one may provide a greater benefit than the other.

The key fact, overlooked by Monongahela, is that the average agreement is a concession to the shipper, and it provides a specific basis for obtaining relief from applicable demurrage charges. It applies at the sole election of the shipper or consignee, and it may be cancelled at any time by the giving of 30 days' notice.

The law governing the average agreement basis of settling demurrage charges is well-settled. The fact that Monongahela and other shippers, who have long enjoyed its benefits, may now be dissatisfied because they have incurred demurrage charges in a particular circumstance under the average agreement, does not create an important question requiring determination by this Court.

CONCLUSION

There is no error in the decision below, and no reason for review by this Court has been set forth by the petition. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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